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FADZLY NOR RAHIM & ANOR

v.

CHANG FOH CHIN

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HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[CIVIL APPEAL NO: 12-08-2007-II]
17 AUGUST 2007

C ***DAMAGES:*** *Personal injuries - Past and future loss of earnings - Whether rightfully assessed by trial judge - Whether income includes all incomes except for permitted deductibles - Whether bonus to be included as income - Whether cash fringe benefits must be taken into account*

D ***DAMAGES:*** *Personal injuries - Loss of future earnings - Proof - Whether there is credible medical evidence of serious injuries sustained by plaintiff - Fracture of long bone and complications which could cause disabilities - Whether there is "substantial" or "real" risk of plaintiff losing his present job*

E ***CIVIL LAW ACT:*** *Damages - Running-down action - Multiplicand for loss of earnings - Whether bonus and other cash fringe benefits to be treated as income*

F ***CIVIL PROCEDURE:*** *Appeal - Evidence, evaluation of - Road accident - Whether interference by appellate court warranted - Appellate court not to interfere with findings and award of Sessions Court merely because it appears to be excessive unless award or findings clearly wrong or erroneous in law and principle*

G The plaintiff suffered injuries in a motor vehicle accident. At the material time of accident, the plaintiff was employed as a lorry driver and his employment was terminated as a result of the accident. As a driver, the plaintiff was required to make frequent trips, averaging 10 - 12 trips per month to Sibu to transport gas cylinders. On top of his basic salary of RM500 per month, he was paid RM130 per outstation trip he made and on average he earned RM1,713 per month. Over and above his salary he was paid RM200 per month from Shell as an incentive and a bonus H of RM500 per year. For the three months following the accident, the plaintiff was paid only his basic salary of RM500 per month. The learned sessions judge *inter alia* awarded RM29,700 for pain and suffering, RM91,824 for loss of future earnings, RM50,511 for pre trial loss of income and RM2,800 for cost of care. The defendant appealed I against the quantum only. The grounds of appeal of the defendant were *inter alia* as follow: (a) that the court was wrong in accepting a sum of RM1,000 as the plaintiff's bonus when the nature of the bonus was

variable and dependent on the company's performance and discretion; (b) that it was wrong to award the sum of RM1,713 (multiplicand) per month as the plaintiff's pre-trial loss of income when his basic salary was only RM500; (c) that it was wrong to award pre-trial loss of income to include allowance for trips of which the number of trips is not fixed and/or certain; (d) that since there was no credible evidence to support that the plaintiff was unable to secure any other employment, the award for loss of future earnings should not have been given at all to the plaintiff and (e) that the appellant had failed to prove that the loss of future earning was in fact sufficiently severe to warrant a substantial award of RM93,824.

Held (dismissing the appeal with costs):

(1) The evidence of the respondent in relation to bonus was never challenged by the appellant and it was not erroneous of the learned sessions judge to award the said sum on the facts of this case. (para 3)

(2) Income in the context of pre-trial loss of income must necessarily be extended to all incomes except for permitted deductibles in this area of law. (para 3)

(3) It will have been impossible in the practical sense in the year 2004 and 2005 to say one can hire a driver for a nett salary of RM450 per month. Thus, the respondent was given other fringe benefits to support his salary. All the fringe benefits in the form of cash necessarily must be taken into account. (para 3)

(4) There was no evidence adduced by the appellant to support the fact that loss of future earnings ought not to be awarded at all. There was credible medical evidence that the injuries sustained by the plaintiff was serious. It was a fracture of a long bone and complications could cause disabilities. This evidence was not challenged. (para 3)

(5) In relation to the award for loss of future earning, there is no logic to argue whether *"such a future loss is in fact sufficiently severe."* The only issue the court has to determine is whether or not there is a *"substantial"* or *"real"* risk that the appellant will lose his present job. The defendant did not give any evidence to impeach the evidence of the plaintiff. (para 3)

(6) It is trite that the appellate court will not interfere with the findings and award of the sessions court, merely because it appears to be excessive, unless it is shown that the award or findings were clearly wrong or erroneous; taking into account irrelevant matters and not considering relevant matters and that the findings were clearly wrong in law and principle. (para 3)

Case(s) referred to:
Amar Singh v. Chin Kiew [1960] 26 MLJ 77 ***(refd)***
Bakhari Ismail v. Zulkifli Abu Saman [2000] 8 CLJ 41 HC ***(refd)***
Chang Chong Foo & Anor v. Shivanathan [2002] 7 MLJ 326 ***(refd)***
Cheng Siak Hor & Anor v. Rozali Ahmad [2002] 4 CLJ 223 HC ***(refd)***
Flint v. Lovell [1934] All ER Rep 200 ***(refd)***
Hii Soo Chiong v. Board of Management Yee Ting Primary School [1973] 2 MLJ 204 ***(refd)***
Moeliker v. A Reyrolle & Co Ltd [1997] 1 All ER 9 ***(refd)***
Tan Chow Soo v. Ratna Ammal [1969] 2 MLJ 49 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 28A(2)(c), (d)

For the appellants - Winnie Chan; M/s David Allan Sagah & Teng Advocates
For the respondent - Shankar RP Asnai; M/s Thomas, Shankar Ram & Co Advocates

Reported by Amutha Suppayah

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the appellant's/defendant's appeal against the decision of the learned sessions judge on quantum only, as in this case interlocutory judgment was entered against the appellants and the appellants did not call any witness.

[2] This case involves motor vehicle accident wherein the plaintiff suffered injuries, including fracture of the left tibia and incised wound of the upper lib. At the material time of the accident, the plaintiff was employed as a lorry driver with Ming Soon Transport. His employment was terminated as a result of the accident. As a driver with Ming Soon Transport, the plaintiff was required to make frequent trips, averaging 10-12 trips per month to Sibu to transport gas cylinders. On top of his basic salary of RM500 per month, he was paid RM130 per outstation trip he made and on average he earned RM1,713 per month. Over and above his salary he was paid another RM200 per month from Shell as

an incentive, which allowance was paid once every three months. The plaintiff also testified that he received bonus in the sum of RM500 per year. The plaintiff's employment was confirmed by PW2, who was Ming Soon Transport's administrative cum account clerk and his salary slips were tendered as exhibits. The payment vouchers for the incentives from Shell were also tendered as exhibits. For the three months following the accident, PW2 testified that the plaintiff was paid only his basic salary of RM500 per month. In assessing damages, the learned sessions judge allowed the following:

General Damages

(i) for pain and suffering: RM29,700

(ii) for loss of future earnings: RM91,824

Special Damages

(i) agreed: RM220

(ii) disputed: RM600

(iii) pre trial loss of income: RM50,511

(iv) cost of care: RM2,800

[3] The appellant attempts to raise nine grounds of appeal which *prima facie* show that the appellant is almost unhappy with all the heads of assessment of damages, without showing in what circumstances the learned judge erred in law or failed to consider established practice and guidelines in assessing damages. I will deal with each and every ground as stated in the memorandum of appeal.

1st Ground

(a) The appellant says that the court was wrong in accepting a sum of RM1,000 as the plaintiff's bonus when the nature of the bonus is variable and dependent on the company's performance and discretion. I do not think on this issue the learned sessions judge took a speculative figure as complained by the appellant. The court had considered the issue and given its reasons for awarding the said sum. The grounds for awarding the said sum read as follows:

> I am satisfied that the plaintiff was gainfully employed as a driver with Ming Soon Transport and earning an average monthly salary of RM1,713.00 which was derived from adding his gross pay in the pay slips Ex. P5(a)-(h) and dividing that by 9 months. I am equally satisfied that he had been receiving

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> RM2,400 per year as incentive for being a good driver by Shell and had been receiving a yearly bonus of RM500 from his employer since he started work from the company. The probability of him being given that bonus by him is still there although I agree that bonus by its nature is variable and dependent on a company's performance and discretion. I therefore award the plaintiff RM1,000 as his bonus for the year 2004 and 2005.

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I take the view that the learned sessions judge has properly exercised her discretion in making the award. Further, the notes of evidence show that the evidence of the respondent in relation to bonus was never challenged by the appellant and it was not erroneous of the learned sessions judge to award the said sum on the facts of this case.

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2nd Ground

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(a) The appellant complains that the learned sessions judge was wrong in awarding the sum of RM1,713 (multiplicand) per month as the plaintiff's pre-trial loss of income when the plaintiff himself testified that his basic salary was only RM500 and says the period for the loss of income allowed by the learned sessions judge was excessive and unreasonable in the circumstances. The appellant asserts that in determining the multiplicand per month towards computation of pre-trial loss of earnings, his bonuses and payment by Shell should not be included but rather be based on his basic salary and general allowances.

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I do not think the proposition of the appellant is supported by any case laws. Income in the context of pre-trial loss of income must necessarily be extended to all incomes except for permitted deductibles in this area of law. [See *Chang Chong Foo & Anor v. Shivanathan* [2002] 7 MLJ 326]. The learned sessions judge has assessed the said sum based on evidence and her reasons is set out above.

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3rd Ground

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(c) The appellant says it was wrong for the learned sessions judge to award pre-trial loss of income to include allowance for trips of which the number of trips is not fixed and/or certain. In consequence, the appellant argues that the multiplicand of RM1,713 for pre-trial loss of income is excessive.

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I do not think the appellant's argument in respect of income is acceptable and logical, taking into consideration the fact that the basic salary of the respondent was only RM450. It will have been impossible in the practical sense in the year 2004 and 2005 to say one can hire a driver for a nett salary of RM450 per month. Thus, the respondent in this case was given other fringe benefits to support his salary. All the fringe benefits in the form of cash necessarily must be taken into account. And this is what the learned sessions judge has done and has given reasons for doing so. I do not think it is appropriate to disturb the reasoned findings.

4th Ground

(d) The appellant complains that the learned sessions judge has failed to assess the credibility of the plaintiff's witness and the inconsistency between the plaintiff's evidence and witness's evidence and says that the witness contradicted the plaintiff's evidence as the witness testified that RM450 is the ceiling for a driver's salary.

I do not think minor discrepancies in oral statement by witness should be part of a complaint in the appeal process when the appellants have not challenged the purported discrepancies through evidence or based on contemporary documents to enable the witness to correct his evidence, if there is an error. Erroneous statements are quiet common when oral evidence is given and it should be properly challenged or clarified by the aggrieved. The court is obliged to take into consideration the totality of the evidence to arrive at a conclusion. The appellant attempts to pick out bare strands of evidence in isolation and accuses the respondent of contradiction, which is unnecessary and ought not to be condoned.

5th Ground

(e) The appellant says loss of future earnings for the plaintiff and a sum of RM1,713 (multiplicand) per month when there is no credible evidence or sufficient evidence to support that the plaintiff is unable to secure any other employment is wrong. In consequence, the appellant asserts that the award for loss of future earnings should not have been given at all to the respondent. I think such an argument lacks *bona fide* and is mischievous more so when there was no evidence adduced by the appellant to support the fact that loss of future earnings ought not to be awarded at all. The learned sessions judge has specifically dealt with this issue. I have perused the evidence and the judgment of the learned sessions judge and I am satisfied that:

(i) the multiplicand of RM1,713 was arrived at by the learned sessions judge correctly in weighing the overall evidence for the respondent; besides the loss of future earnings had been correctly computed strictly in accordance with the provision of s. 28A(2)(c) and (d) of the Civil Law Act 1956.

(ii) the findings of the learned sessions judge on future loss of earnings of RM91,824 is not erroneous and the sum can be accounted for in the following manner; that is the appellant was 47 years old at the time of accident, and the multiplier would be: 55 - 47 = 8, divided by 2 = 4 years. 4 years purchase x 12 x RM1,713 exactly gives a sum of RM91,824 as awarded by the learned sessions judge.

(iii) there is credible medical evidence of PW1, Dr. Nur Azidawati Binti Ab. Halim who testified as follows:

> The fracture did not unite well so bone grafting, open reduction and plating was done. This information was based on the case notes. Mal union means that the fracture did not unite well. The injuries sustained by the plaintiff was serious. It was a fracture of a long bone and complications could cause disabilities.

This evidence was not challenged or opposed by evidence for the court to make a different finding.

6th Ground

(f) The appellant alleges that it was wrong for the learned sessions court judge to make a finding that the appellant was unable to secure any other employment despite his clear admission under cross examination that he could walk already, able to ride a motorcycle, drive an automatic car and had been driving around to look for a job. And relies on this part of the respondent's testimony:

> Now I just stay at home. I am now limping with one leg, I could walk for 1/2 km and then I have to stop to rest. I use my motorcycle to go to the shops. Yes I could ride motorcycle but I have to use the motorcycle's stand for support before alighting from it. I was only able to ride my motorcycle recently. I can only drive an automatic car. If my son come back then I could drive his automatic car. Yes I was able to drive the car early this year. Yes by January this year I could drive the automatic car and rode motorcycle to the shop. I did try to look for job since March this year. I drive around with my friend to look for a job.

AND further asserts based on the above testimony that the award of future earnings should not have been given at all to the respondent. For reasons stated in ground five above, I reject this mischievous submission.

7th Ground

(g) The appellant complains that the award of a sum of RM50,511 for pre-trial loss of income is manifestly excessive and wrong in principle and in law, and erroneously relies on the passages relating to future earnings in the following cases namely (i) *Cheng Siak Hor & Anor v. Rozali Bin Ahmad* [2002] 4 CLJ 223 (ii) *Bakhari Ismail v. Zulkifli Abu Saman* [2000] 8 CLJ 41 (iii) *Chang Chong Foo (supra)*. Pre-trial loss as a matter of law must come under the head of special damages and future earnings under the heads of general damages. In all cases of special damages the claim must be specifically proved. The learned sessions judge has considered this issue in detail and rightly awarded the said sum.

8th Ground

(h) The appellant argues that the award of the sum of RM91,824 for loss of future earning is manifestly excessive and wrong in principle and in law and says that the appellant has failed to prove that such a future loss is in fact sufficiently severe to warrant a substantial award of RM93,824. The appellant here does not base his argument with cases when saying "sufficiently severe to warrant a substantial award." I do not know what the appellant is trying to argue when the law in this area is regulated by statute. There is no logic to argue whether "such a future loss is in fact sufficiently severe." The only issue the court has to determine is whether or not there is a "substantial" or "real" risk that the appellant will lose his present job. The law in this area is well articulated in the case of *Moeliker v. A Reyrolle & Co Ltd* [1997] 1 All ER 9, Browne LJ opined:

> The consideration of this head of damages should be made in two stages. 1. Is there a "substantial" or "real" risk that a plaintiff will lose his present job at some time before the estimated end of his working life? 2. If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chance of getting a job at all, or an equally well paid job.

> It is impossible to suggest any formula for solving the extremely difficult problems involved in the second stage of the assessment. A judge must look at all the factors which are relevant in a particular case and do the best he can.

On the facts of our case, it is the finding of the learned sessions judge that because of the accident the respondent's job was terminated and in reliance of the evidence, inclusive of medical evidence which remained unchallenged, the court made a finding and awarded the sum for pre-trial loss. I take the view that in doing so the court has correctly assessed the sum of future loss of earning as set out in s. 28A(2)(c) and (d) of the Civil Law Act 1956. In *Chang Chong Foo (supra)*, Harun Hashim SCJJ (as he then was) opined:

> In *Tan Kim Chuan &. Anor v. Chandu Nair*, this court said at p. 44:
>
> > The marginal note to s. 28A which reads "Damages in respect of personal injuries" suggests that the provisions are exhaustive and mandatory.
> >
> > The question is whether s. 28A(2)(c)(iii) applies to the facts of this case.
> >
> > The Act separates the method of assessing damages as to whether the plaintiff dies or survives from his injuries as follows:
> >
> > (a) Fatal accident cases
> >
> > If the death of a person is caused by the wrongful act, neglect or default of another person, then compensation to the family of the deceased person for loss occasioned by his death may be claimed under s. 7, which also provides how such damages are to be assessed.
> >
> > (b) Personal injury cases
> >
> > In respect of personal injury which does not result in death, the assessment of damages is governed by s. 28A. Subsection (1) provides that any moneys payable under (a), (b) or (c) shall not be taken into account. Subsection (2) provides the method of assessing damages in such cases. What concerns us presently is sub-s. (2)(c)(iii) which states:
> >
> > In awarding damages for **loss of future earnings** the Court shall take into account: ... any diminution of any

> **such amount as** aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured. (Emphasis added.)
>
> **Such amount** referred to in (iii) is the amount of his **earnings** at the time of the injury referred to in (ii).
>
> The diminution referred to in (iii) is the living expenses of the plaintiff at the time he was injured.
>
> On a plain reading of the subsection we are of the view that by the use of the word diminution in (iii) the intention of the legislature is that in awarding damages for loss of future earnings the entire sum of his earnings should not be used to calculate the amount payable under sub-s. 2(c). In the instant case that sum is $310 pm. This diminution, however, is subject to proof by the defendant or admitted by the plaintiff. There **is no proof here because the defendant did not give evidence**. (emphasis added).

On the facts of this case, the appellant did not give any evidence to impeach the evidence of the respondent and now it cannot be made a subject of complaint here as enunciated by the Supreme Court decision above.

It is trite that the appellate court will not interfere with the findings and award of the sessions court, merely because it appears to be excessive, unless the following are shown: (i) that the award or findings were clearly wrong or erroneous; taking into account irrelevant matters and not considering relevant matters. (ii) that the findings were clearly wrong in law and principle.

(i) In *Amar Singh v. Chin Kiew* [1960] 26 MLJ 77, Thomson CJ opined:

> The fixation of damages is so largely a matter of opinion or of impression that differences of calculation or assessment are to be expected. It is, to some extent an exercise of judicial discretion. The Court of Appeal will not therefore give preference to their own figure simply because they disagree with the figure arrived at by the trial judge; they will only interfere if they are satisfied that the judge has acted on a wrong principle of law or has misapprehended the facts, or has, for those or other reasons made a wholly erroneous estimate of the damage suffered.

(ii) In *Flint v. Lovell* [1934] All ER Rep 200, Greer LJ opined:

> To justify reversing the assessment of damages by a judge who has tried the case without a jury, the Court of Appeal must be convinced either that the judge has acted on a wrong principle of

A law or that the amount awarded was so extremely high or so very small as to make the assessment an entirely erroneous estimate of the damages to which the plaintiff is entitled.

(iii) In *Tan Chow Soo v. Ratna Ammal* [1969] 2 MLJ 49, the Privy Council observed:

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> In this kind of case it is very rarely that an appellate court is justified in reversing the decision of the trial judge who has had the opportunity of seeing and hearing the witness and who had directed himself correctly, as to the caution with which to approach the evidence of witnesses who were confessedly parties
C to an unlawful and corrupt transaction.

(iv) In *Hii Soo Chiong v. Board of Management Yee Ting Primary School* [1973] 2 MLJ 204, the Federal Court observed:

> As in this case the finding of facts by the trial judge were based
D on the credibility of the witnesses, the appellate court could not interfere with his decision and the appeal must be dismissed.

AND Azmi LP opined:

> On this question I think it is relevant to refer to what Lord
E Diplock said when his Lordship was delivering the advice of the Privy Council in *Tan Chow Soo v. Ratna Ammal*:
>
> > It is apparent from this summary of the evidence, which is analysed in detail in the careful judgment of the trial judge, Raja Azlan Shah J., that this was a classic example of a
> F case in which the decision depends entirely upon which parts of the conflicting testimony of the witnesses who gave oral evidence before the learned judge at the trial, were to be believed. An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility
> G than the trial judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence and embarrassment.

[4] For reasons stated above, I dismiss the appellants' appeal with
H costs. The getting-up fees shall not exceed RM20,000. In the event the getting-up fees cannot be agreed upon, the respondent is at liberty to tax the costs. I hereby order so.

I